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ABSTRACT

Intended for state directors of special education in the Southwest Region, the information packet provides materials relating to the development, initiation, implementation or refinement of impartial due process procedures. Included are the following: a matrix outlining current procedures, policies, and general information on due process from other selected states; a discussion on how different states are responding to specific due process issues in areas where federal laws allow alternative approaches; a discussion on the mediation processes used by some states, and a rationale for implementing a mediation/conciliation/prehearing process; a question-and-answer paper prepared by the Assistant Director of Procedural Safeguards and Due Process from Ohio; and copies of training manuals obtained from other states. (SBH)

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Information Packet

on

Impartial Due Process Procedures

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April, 1978

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Introduction

Information Packet on Impartial Due Process Procedures

The information in this packet was gathered from several sources to provide resources that would hopefully aid the State Directors of Special Education in the Southwest Region in the development, initiation, implementation or refinement of impartial due process procedures. Several types of information are contained herein:

A matrix outlining current procedures, policies, and general information on due process from other selected states;

A discussion on how different states are responding to specific due process issues in areas where federal laws allow alternative approaches;

A discussion on the mediation processes used by some states, and a rationale for implementing a mediation/conciliation/prehearing process;

A question-and-answer paper prepared by the Assistant Director of Procedural Safeguards and Due Process from Ohio;

Copies of training manuals obtained from other states (and available only to the six State Directors).

The materials were assembled to provide general information and stimulate planning, to identify other states and persons who might provide more information to the State Directors on specific issues, and to present a general overview of the current state-of-the art on due process procedures.

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Matrix (separate document)

The following documents (available only to the Southwest Region State Directors of Special Education):

Impartial Hearing Officer Training Manual. Ohio Department of Education, Division of Special Education. (no date).

The Implementation of Due Process in Massachusetts. Washington, D.C.: National Association of State Directors of Special Education, 1978.

A Model for a Special Education Due Process Hearing. Lansing, Michigan: Great Lakes Regional Resource Center, August, 1977.

Chapter 766. Special Education Appeals Guidelines. Massachusetts Department of Education, Spring, 1977.

Discussion of Several Hearing Process Issues

Issue 1: Who must keep a list of persons who serve as hearing officers? How many names should be on the list?

The law states that, "Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons." Some states require LEAs to maintain lists; in other states, the SEA maintains the list for the entire state. In making this decision (which is reflected in the annual program plan), the following factors might be considered: Who will conduct the hearing, the SEA or the LEA? Are there hearings in the state that it is necessary for each LEA to handle its own hearings? Are there few hearings? Does state law indicate responsibility? How many hearing officers are there in the state?

The law requires a "list," which implies that more than one hearing officer should be trained; however, research indicates that few states specify the number of names to be maintained on the list. Pennsylvania has appointed and trained 60 to 70 hearing officers. New Jersey has five trained hearing officers; one is full-time and carries most of the caseload. In general, the number of hearing officers available varies according to demand, but it appears a large enough number should be appointed and trained so that a choice is possible and a replacement can be appointed if a hearing officer is disqualified.

Issue 2: Who is prohibited from serving as a hearing officer?

The law specifically prohibits a person serving as a hearing officer who is an employee of a public agency which is involved in the education or care of the child. The question has arisen as to whether an employee of another LEA in the state could serve as a hearing officer. While this is not specifically covered in the law, a person is prohibited from serving if he or she has "a personal or professional interest which would conflict with his or her objectivity in the hearing."

Several states, e.g., Tennessee, require that the hearing officer be a resident of an LEA other than that of the child. This could protect both parties in the hearing. If the hearing officer has attended school in the district, has children who have attended school in the district, has talked to his neighbors about their children's experiences in the schools, or reads the local newspaper, he probably has a general feeling about the quality of the schools, good or bad, correct or incorrect. This could conflict with his impartiality. If neither party objects, however, use of a local hearing officer could mean decreased expenses.

Issue 3: Who appoints the hearing officer? Who selects the persons who will be on the list of potential hearing officers? Do parents have a choice in the selection?

The law states that "The hearing must be conducted by the state educational agency or the public agency directly responsible for the education of the child." This seeems to suggest that the SEA or LEA would be responsible for the selection of potential hearing officers and would, in addition, have the responsiblity of choosing the particular hearing officer to preside at the hearing. While state laws vary, most allow for the selection of the hearing officer by the SEA.

In some states, e.g., Ohio and Minnesota, the hearing officer is selected jointly by the LEA and parent. In general, it would seem to be advantageous to have a hearing officer who meets with the approval of both participants as this could help avoid further litigation.

Reed Martin states,

> Federal regulations say a list of hearing officers and their qualifications must be kept. The regulations do not indicate, however, that anyone can see them. However, many of us believe that is an implied right. So what procedure do you follow if a party challenges the hearing officer on qualifications or bias? The officer could note the challenge, let the party present his argument, and then decide whether to disqualify himself. If he does not, the hearing would proceed and the party could challenge an adverse decision on the hearing officer issue. Or perhaps the school district, which is responsible for choosing the hearing officers, could set up some mechanism for hearing such a challenge prior to a hearing. Their decision, of course, would have to be appealable.[1]

Issue 4: From what pool are the hearing officers to be drawn? Who makes the best hearing officers? Educators? Lawyers? Parent advocates? Social service workers? Graduate students? University personnel?

In general, a case can be made for or against using any group of individuals as hearing officers. For example, educators have an understanding of the needs and problems of handicapped children

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[1]Reed Martin, in a letter to G.T.L. Holt and the Southwest Regional Resource Center, April 1, 1978.

and school systems, and would appear to have the kind of expertise needed to judge the type of evidence presented at the hearing. One state finds that college professors are generally in tune with the situation, respond well to training, and write good reports. Although most states researched use special educators, Massachusetts has found that educators have their own particular theories on how a child should be educated and this sometimes interferes with their impartiality. In addition, they found educators had a tendency to lose control of the hearings and to make legal errors.[2]

Lawyers, on the other hand, can control the hearings and understand the legal implications but often have little background in education. In addition, the parent may be intimidated by a hearing; having a lawyer as the hearing officer may tend to make it more formal than it needs to be. Although Massachusetts uses trained attorneys for hearing officers, they ". . . found group processes skills and familiarity with education and human services to be more valuable than legal training."[3]

Arguments can be made for and against any type of individual selected. In general, some considerations might be: Can the individual remain impartial? Be trained to control the hearing and encourage participation of parents as well as experts? Will the person be available in the state for a length of time which justifies training? Does he/she have time to devote to the hearings?

Issue 5: What are the qualifications of a competent hearing officer?

In general, most states require that the hearing officer meet the requirements of PL 94-142, i.e.:

Unbiased,
Disinterested,
Independent.

Ohio holds an orientation for potential hearing officers; they have found that approximately one-third of the recruits drop out of the program at that time.

Two states, in their rules and regulations, specify criteria for hearing officers.

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[2]The Implementation of Due Process in Massachusetts: A Summary and Recommendations for State and Local Education Agencies. Disseminated by the National Association of State Directors of Special Education, 1978, p. 3. (included in packet)

[3]Ibid., p. 8.

Illinois (no date):

1. Shall not be an employee of the Illinois Office of Education

2. Shall not be an employee of the local education agency involved

3. Shall not be involved in the decisions already made about a child regarding identification, evaluation, placement, or review

4. Shall not be a resident of the district involved

5. Shall possess knowledge, acquired through training and/or experiences, about the nature and needs of exceptional children; an awareness and understanding of the types and quality of programs available for handicapped children is essential

6. Shall be sufficiently open-minded to listen to all the facts yet also capable of making necessary decisions

7. Shall possess the ability to solicit and evaluate both oral and written information that needs to be considered in relation to decision-making

8. Shall have the ability to structure and conduct hearings in conformity with standard requirements as outlined by the Illinois Office of Education

9. Shall be sufficiently free of other obligations in order to carry out above responsibilities and meet the required timelines for conducting hearings and reporting written recommendations

Tennessee (June, 1975):

1. Be a resident of a school district in Tennessee other than the one in which the child resides and not be an employee of the one which the child attends

2. Be selected by the Right to Education Office, subject to confirmation by the State Commissioner of Education

3. Possess general qualities required to make fair decisions

4. Be knowledgeable and experienced in the field of special education

5. Be familiar with community resources and the services they offer but shall not have been involved in the placement decision of the child

6. Possess a minimum of a bachelor's degree with preference toward more training

7. Agree to complete the prescribed inservice training course for the hearing officer as developed by the Right to Education Office

8. Be available to travel within the geographic areas of the state

9. Be available to conduct hearings during the day or evening as the case might be, based upon the convenience of parents

Issue 6: What type of training is adequate for a hearing officer? Is inservice necessary? Should a manual be available? Who should be responsible for training the hearing officer?

In general, SEAs appear to be training impartial hearing officers. In Ohio, the Division of Special Education has an Assistant Director for Procedural Safeguards and Due Process, who has the responsibility of preparing hearing officers. A comprehensive manual has been developed for use in this training [included]. Michigan and New Jersey have both developed training manuals for hearing officers. Tennessee and Illinois hold training workshops to train hearing officers. Initially, Pennsylvania selected two lawyers (the Deputy Attorney General in the Justice Department and the attorney for the plaintiff), and these two men, together or separately, trained hearing officers in groups of ten to fifteen; they update this training by requiring hearing officers to attend two yearly meetings but they are not currently training new officers. Arizona, through the sponsorship of the Southwest Regional Resource Center, trained approximately 55 hearing officers in a three-day session. A training manual, developed by the National Association of State Directors of Special Education through consultant agreements, served as the primary training resource. An intensive four-day session is used in Massachusetts, and covers topics from the law to the analysis of evidence. New Jersey includes writing decisions to enable parent understanding as part of their training. New Jersey is also considering having their hearing officers attend an inservice training session with teachers on IEP monitoring to help them keep abreast of current practices.

Issue 7: Should the hearing officer be expected/allowed to hear several cases in a row? How much time does a hearing require? How many cases are reasonable in a given length of time?

There are no specific requirements in the law as to the number or frequency of hearings. Georgia prohibits an individual from serving as a hearing officer in more than three consecutive hearings, but New Jersey has one full-time hearing officer who hears almost one case per week. Massachusetts has found that the length of hearings averages from six to eight hours. In general, the number of hearings assigned to one officer would appear to vary depending on how many hearings are held in the state, how many hearing officers are available, and other obligations held by the hearing officer. In 1975, Illinois was crediting their hearing officers with two days of work per hearing. This included preparation, holding the hearing, and writing the decision. The question arises as to whether a hearing officer can hear three cases per week and still maintain his impartiality as a nonemployee of the SEA. On the other hand, is it worth the trouble of training a hearing officer to hear one case per year?

Issue 8: How is the hearing officer paid? By the case? By the hour? By the year? Is a volunteer program appropriate?

Some states are looking at the possibility of using volunteers as hearing officers. While this appears to have some advantages and may tend to produce a type of altruistic hearing officer, in states where a considerable number of hearings are held, this may not be practical. The training investment in time and money maybe lost if the person is needed for more hearings than she or he can afford to "donate." This should be considered before planning a volunteer program.

Since 1975, Illinois has paid for hearing officers' travel, meals and lodging (if overnight), and a professional fee of $75 per day. Pennsylvania pays $100 per hearing plus $7.50 per hour for writing the decision. In Massachusetts, where full-time hearing officers are employed, annual salaries range from $14,000 to $18,300; consultants receive $66 per day.

Issue 9: What are the responsibilities of the hearing officer and/or the SEA/LEA in planning and running a hearing? Who is responsible for the following:

Setting the time, date, and place for the hearing and making arrangements for a suitable place?

Contacting the participants?

Arranging for an interpreter, if necessary?

Arranging for a record of the hearing? Arranging for recording equipment, tapes, extension cords, etc.?

Notifying individuals of their rights and ensuring that they have access to the records?

Distributing transcripts of the hearing?

Distributing the decision?

The division of responsibilities on the above type of assignments varies from state to state. If these tasks are assigned to the hearing officer, the agency will have to compensate him or her for time spent on tasks that could be accomplished by someone else.

Reed Martin[4] has commented on some of the tasks which are assigned by some states to the hearing officer. Regarding such tasks as inspecting public agency information to ensure compliance and requesting further information prior to the hearing, he states, "They are not activities to be undertaken by an impartial hearing officer. What if the hearing officer pursued these steps and found deficiencies? Would that not bias things? Would the hearing officer insist that they be corrected even when neither party was raising them nor relying on them?" He points out that the hearing officer is limited to deciding the presenting complaint and should not go beyond that issue in his or her decision.

Concerning such activities as contacting participants, sending letters to participants, disseminating evidence, checking with the parent to see if due process has been followed, etc., Martin says,

> . . . [These tasks] need to be done but I do not feel the whole activity should be by the hearing officer. First, most of the subtasks are clerical. To have the hearing officer perform them would be very costly and would probably drive hearing officers away. . . Second, the subtasks could best be performed by someone who rountinely does them. Most schools will draw on panels of hearing officers and each time a hearing officer attempts these tasks for the first time, there will be mistakes. Why not assign one person the task and know it will be done well and always done the same way? Third, it puts the hearing officer in too much contact with the subject matter of the case in an unregulated way. It would really invite questions of bias.

In preparing and distributing the decision, it is important to remember that it is highly confidential. The fewer persons involved in typing, mailing or otherwise handling the decision, the better the chances of maintaining confidentiality. If the hearing officer

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[4]Martin, op cit.

cannot handle this phase of the procedure, care should be taken in selecting the school employee who does handle it.

Issue 10: Should specific forms be used for notification of participants? What is the format for the final decision?

Many states have developed form letters which are sent to notify participants, to request witness participation, etc. Some even have a form which the parent may complete to request a hearing. Forms seem to save considerable time for the hearing officer and also seem to help fulfill the communication requirements. If forms are used, the hearing officer should double-check to make sure they meet the needs of the specific case to be heard.

Many states also have a formal outline for the decision. This would seem to be helpful to the hearing officer and may be particularly important if the hearing officer does not have a backgound in law.

Issue 11: Can the hearing officer provide the parents with a list of independent evaluators, legal counsel, or other types of references?

This type of help may violate the requirement for a hearing officer to be impartial and disinterested. The SEA or LEA must provide this information if the parent requests it, or if a hearing is initiated.

Issue 12: Can the hearing officer discuss the case with either of the participants prior to the hearing? If he must contact them to make arrangements for the hearing, how does he avoid discussions?

The decision of the hearing officer must be based on evidence presented at the hearing only. Under no circumstances is he or she to discuss the issues with the participants or anyone else prior to the hearing. In contacting the participants to plan for the hearing, the hearing officer must be very firm in refusing to discuss these issues.

Issue 13: What is the hearing officer's responsibility if participants use words which are not familiar to the parents, the hearing officer, or other hearing participants?

Considering the number of different professions which may be represented at the hearing, e.g., lawyers, educators, special educators, psychologists, parents, etc., the use of jargon could become a problem. The impartial hearing officer should encourage participants to use language which is intelligible to all present. Should a statement be made which someone does not understand, the hearing officer should immediately seek clarification.

Issue 14: What is the responsibility of the hearing officer in controlling the hearing?

Hearing officers need careful training in order to be able to control the hearing. Testimonies should be kept short and concise, and it is the hearing officer's responsibility to attend to this. In addition, the hearing officer should not permit witnesses to wander far afield of the issues in the case nor allow them to indulge in personal abuse of other participants with whom they disagree.

Issue 15: What would justify postponing a hearing? What can be done to avoid such postponements?

According to PL 94-142, "A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party." In addition, a hearing apparently may be postponed if the hearing officer determines that all of the parent's rights, i.e., notice of hearing, access to records, etc., have not been met. This seems to be subject to specific state law.

As postponement of hearings is a source of considerable annoyance to parents in addition to possibly delaying appropriate services for a child, care should be taken to hold the hearing as quickly as possible with few, if any, postponements. One thing which might help facilitate meeting the schedule would be for the hearing officer or the SEA to make sure that the parents understand their rights far enough in advance of the hearing to enable them to take the initiative in pursuing these rights. All participants should be notified that any evidence which is to be entered must be given to each party at least five days before the hearing.

Issue 16: What evidence is admissible?

In general, the hearing officer should allow a wide latitude in presentation of evidence. Evidence which is irrelevant to the current hearing may be ruled as inadmissible. In addition, the law states that "Any party to a hearing has the right to. . . Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing."

Martin states that hearsay evidence should be "allowed at the hearing but. . . ignored by the hearing officer in making his decision." If hearsay is to be excluded at the hearing, "you will need lawyers to serve as hearing officers and handle objections on the basis of rules of evidence."[5] It should be noted that legal mistakes made

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[5] Ibid.

by the hearing officer can be grounds for appeal so careful instruction in these matters should be given.

Issue 17: What authority does the hearing officer have to "compel" witnesses to attend the hearing? What recourse does he have if the witness refuses?

The law specifically states that "Any party to a hearing has the right to . . . compel the attendance of a witness." In most states, however, the hearing officer cannot subpoena witnesses, etc.

Martin states that "Compulsory attendance is really a troublesome area. What real authority does a hearing officer have? I would suggest tracing the hearing officer's authority through the State Education Agency review power, and presumably under the State Administrative Procedures Act there would be authority for compulsory attendance." In addition, concerning witnesses who cannot be compelled, he states, "I would suggest [that] the information about which the witness would have testified would be stricken from the record and the party relying on that witness would have to build their case another way."[6]

In one state, parents are beginning to request that witnesses be subpoenaed. Forms, by the SEA, are distributed to the impartial hearing officer prior to a hearing. The hearing officer completes the forms and they are served on the witnesses by the sheriff. Perhaps schools should institute a policy of mandatory attendance by employees who are called as witnesses to preclude this in other states. (This adds another dimension to the hearing officer's duties, and will probably result in increased hearing officer costs in the involved state.)

Issue 18: Upon whom does the burden of proof rest? The school district? The parent? The person requesting the hearing?

Depending on state laws, the burden of proof rests upon the school district or upon the party who requested the hearing.

Martin feels that the public agency does not necessarily always have the burden of proof. ". . . If a parent requests a hearing because he feels his cerebral palsied child needs occupational therapy but the individual education plan called for none, who has the burden?. . . I think there are some cases where the parent would have the burden and would want to present first. A general test used to determine who has the burden is to ask which party would fail if no evidence at all were offered on the issue. Whomever asserts an issue (e.g., my child needs occupational

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[6] Ibid.

therapy) would apparently have the burden. After establishing a prima facie case, the burden might shift to the school to prove that what it is doing is appropriate. But the school would not have the initial burden of proof on every issue."[7]

Issue 19: Who receives a copy of the decision? Of the transcript? Do records of the hearing become part of a permanent file or are they destroyed? How long are they kept and by whom?

The law specifies that "Any party to a hearing has the right to: . . . Obtain a written or electronic verbatim record of the hearing; obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the state advisory panel. . .)"

In other words, other than the two parties at the hearing, no one should have access to the records from the hearing. These are considered confidential and care should be taken to protect this confidentiality.

Some states require that the records of the hearing be kept for a specific amount of time, e.g., three years, and then destroyed. Other states keep records with all identifiable material removed. In general, the important thing is to protect the child's right to confidentiality.

Martin suggests, "Some procedure should be made to publish hearings, without personally identifiable information, so that they can be used as precedents. After quite a few hearings have been held, schools will see what is being upheld at the state level and hearing officers can see what is being reversed. Such information is vital and should be made available in a systematic way."[8]

Issue 20: What are the time constraints in holding a hearing and in presenting a decision?

The law states that "The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

> A final decision is reached in the hearing; and
> a copy of the decision is mailed to each of the parties."

In addition, many states have specific time limits for different phases of the procedures. For example, the time and date for the hearing must be set within 10 days, the parents and school notified

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[7] Ibid.

[8] Ibid.

within 15 days, the hearing held within 30 days, and the decision distributed within 45 days.

Issue 21: What is the procedure concerning objections?

According to Martin,

> . . . the hearing officer should be trained to note any objections raised during the proceeding and his rulings on them. If for example he refused to allow certain evidence to be admitted, it would not be reflected in the decision. But the refusal to allow it in should be reflected so that if the hearing officer were in error, that could be argued on appeal. The parties should be told that they have a right to state that they object and the hearing officer should maintain a separate listing for all rulings on objections.[9]

Issue 22: Should a prehearing conference be held?

Martin says,

> I am a strong believer in Prehearing Conferences. Persons who have used them have indicated to me that they save a great deal of time and effort. . . . There would be a scheduled meeting at which both parties would be present. The hearing officer would not hear evidence or any arguments but would seek to establish five things: (1) What are the issues on which a decision must turn? All extraneous material will be kept out. This helps the parties trim down their presentations. (2) What evidence in regard to these issues can be stipulated (agreed to) by the parties? This saves on the production of unnecessary witnesses and presentation of evidence about matters over which there is no disagreement. (3) What witnesses will be called? This can prevent repetitious witnesses, can assure that the five day disclosure rule is honored, and can determine if any witnesses must be compelled. (4) The hearing officer can determine if a serious question about evaluation exists and can order an independent evaluation. It is a real waste of time and money to have a full scale hearing, discover insufficient evaluation, and have to postpone the hearing until evaluations can be completed. (5) The hearing officer can determine if there is any need to postpone the date of the hearing (e.g., for the evaluation, or to determine if compelled witnesses will be available).

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[9] Ibid.

> Then when parties arrive at the hearing, they will be ready and a more efficient proceeding can be expected. The results might not only be fairer but much less costly. The average hearing in Pennsylvania has been costing $5,000. A major reason for that was the number of school personnel being kept around for several days on the chance that they might be needed. A prehearing conference could eliminate that waste and its cost. I would also not be surprised if an occasional prehearing conference, similar to a pre-trial conference, finally crystallized the issues to the point an agreement could be reached and a full hearing avoided.[10]

Many states hold a prehearing or mediation conference. These are generally different from the prehearing conference recommended by Martin. The next section discusses some of these procedures.

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[10] Ibid.

Some Alternative Approaches to Problem-Solving

Either a parent or an educational agency may initiate a due process hearing with an ultimate purpose of providing a free, appropriate public education for a handicapped child. While an impartial due process hearing is meant to protect the rights of the child, the parents, and the school, and while PL 94-142 upholds the parents' rights to an impartial hearing, considerable expense in time, money, and emotional stress might be saved if resolution to a problem could be reached before a formal hearing occurred.

Massachusetts has held a considerable number of hearings, and they have found that:

> For parents, the costs of lawyers and specialists ran as high as $4,000. The average cost of a lawyer was $800 to $1,000.
>
> Minimal expenses to the school system included the costs of substitutes, the preparation of written materials, and staff time. In addition, the schools incurred attorneys' fees of up to $8,000 per hearing, with an average of $800 to $1,000 in attorney's fees.[1]

In 1976, the Research Institute for Educational Problems, Inc., conducted a national study of due process trends developing in states in response to PL 94-142. At that time, Lawrence Kotin wrote:

> . . . . . the principal question which must be asked is whether the traditional due process systems which have been adopted by most states will actually achieve their purpose in the special education context.
>
> For example, most of the systems described. . . stress the formal due process hearing and place little emphasis on parent and child involvement <u>prior</u> to the development of a recommendation for an educational placement.

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[1] The Implementation of Due Process in Massachusetts: A Summary and Recommendations for State and Local Education Agencies. Washington, D.C.: Disseminated by the National Association of State Directors of Special Education. 1978. p.2. (included)

> Given the importance of the involvement of the parents and child in helping to develop a special education plan, it is critical to determine whether the present approach will result in the most appropriate educational plan, and facilitate long term cooperation between the parents and the school, as service provider, or whether it will heighten the adversarial qualities of a model which already emphasizes those qualities.
>
> The due process model which is being developed by most states does not routinely provide for informal discussion mechanisms for the resolution of differences of opinion between the home and school. Considering the high degree of qualitative and subjective decision-making involved in a typical special education situation the usual due process model seems poorly adapted to arrive at a decision which is either rational and/or generally accepted by the school, the parents and the child, when serious differences have developed among these parties.[2]

Kotin further discusses the mediation approach as follows:

> In addition to the various informal consultation requirements and to the more formal due process hearing, several states have provided for a mediation procedure to be available at the time of commencement of the process leading to the impartial due process hearing. This procedure is not required by PL 94-142. The general differences between the mediation procedure and the due process hearing are that mediation is less formal, less adversarial and less pressured than the hearing.
>
> A number of criticisms have been made of the exclusive use of an impartial due process hearing without any prior mediation process. Among these are that the due process hearing: 1) requires a great financial and emotional cost of the participants; 2) is too abstract and does not provide the hearing officer with a complete picture of the child's needs or of the school system's ability to implement a plan; 3) tends to be overly legalistic and narrow in focus, obscuring the goal of an educational placement which is in the

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[2] Lawrence Kotin and Nancy B. Eager. Due Process in Special Education: A Legal Analysis. Cambridge, Mass.: Research Institute for Educational Problems, 1977. pp. 9-10.

best interests of the child; 4) tends to exclude poor and minority parents because of lack of pre-hearing outreach and communication and because of the intimidating nature of the formal hearing. The critics of the due process hearing, while recognizing the need for it, believe that the need could be reduced and the due process hearing made more effective by the addition of a prior mediation process which focuses or resolves issues.

The advantage of a mediation process in comparison and as an adjunct to a due process hearing are considered by its advocates to be the following: 1) it is slower and the fact-finding is more complete; 2) the mediator, more easily than a hearing officer, can reduce parent anxiety and increase parent involvement; 3) the mediator can suggest new program ideas to schools, while the hearing officer is less able to do this because of the requirement of "impartiality," which, while important in the mediation process, is not as heavily stressed; 4) mediated agreements are "better for the child" because they are more complete than hearing decisions which tend to be more "skeletal" and abstract; 5) local school systems are more likely to implement a decision reached through mediation than one forced upon them by the hearing process; 6) the issues are clearer earlier than in the hearing process; and 7) mediators are more "successful" in resolving disputes than are hearing officers, and, therefore have more job satisfaction than hearing officers.

Introduction of a mediation process into a special education due process system would involve a substantial amount of effort. Nevertheless, such effort might well be compensated for by a total process which is procedurally fair and which produces the best possible educational result.[3]

In researching current information from a few states, it was found that most of them encourage either informal or formal prehearing, conciliation, or mediation conferences prior to a full hearing. In Utah, the SEA recommends that each district exhaust every avenue for reaching a solution at the lowest administrative level possible; i.e., between the parents and teacher, then between the parents and principal, etc.

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[3]Ibid., p. 24.

Other states have adopted more formal processes. In Massachusetts, a person in the regional office arranges a prehearing conference; if a mutually agreeable solution is not reached at this point, the same regional staff member informs the parents of their rights and provides information on the hearing process. Tennessee has a "Right to an Education Officer," who serves the entire state. This officer initiates conferences for trying to reach a solution between the parties and circumvent a full hearing; if a solution is not reached, however, this same person arranges for a formal hearing.

New Jersey's child study teams, which include an SEA and an LEA representative, work with the parents and the involved LEA personnel to solve disputes; the team may hold a mediation conference before or after a request for a hearing. Some parents, however, choose to go directly to a hearing (an option which federal law provides parents in all states).

Ohio has an Assistant Director for Procedural Safeguards and Due Process; this individual is assigned when a hearing is requested. He holds a prehearing conference and tries to work out the problems without resorting to a hearing. To date, only one parent has rejected the offer of this mediation service. Ohio held only six hearings during the last year, has held none during the current year, and has two hearings pending. According to S.J. Bonham, Ohio State Director of Special Education, several factors may be involved in the low incidence of hearings in that state. First, Ohio did not go into the implementation of due process with a backlog of adversarial problems. Ohio has also hired an ombudsman, titled the Consultant for Educational Placement, who takes all telephoned complaints to the state education office; he has handled 137 cases this year, all of which were solved without hearings. (This position was originally filled under a DD grant; it has been so successful it has been maintained.) If a complaint received at the state office is not solved by the ombudsman, the State Director writes to the involved school district, asking them to provide information as to the validity of the complaint and report any corrective action they may have taken. The district has 30 days to reply, and a copy of that reply, along with a cover letter, goes to the parents. Ohio feels many problems are solved through this simple procedure. Both the State Director and the Assistant Director for Procedural Safeguards and Due Process spend considerable time talking with parents and advocacy groups in order to solve problems before they escalate into major issues. (The importance attached to solving educational problems is reflected in the placement in the administrative structure of the Assistant Director for Procedural Safeguards and Due Process.)[4]

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[4]Information on Ohio based on telephone conversation with S.J. Bonham, Jr., April 13, 1978 and a letter from him to Janice Gygi, Southwest Regional Resource Center, May 1, 1978.

Two sets of state guidelines for prehearing conferences follow. Both were developed prior to the final rules and regulations for PL 94-142. A few statements that appear to conflict with current federal regulations have been deleted; language changes made by the SRRC are indicated by striking through the original word and underlining the substituted one. Bracketed statements--also added by the SRRC--indicate areas where attention should be paid to current confidentiality requirements. The guidelines will hopefully provide a stimulus for development of mediation procedures to meet unique SEA or LEA needs. A mediator's manual is also contained within the Massachusetts Special Education Appeals Guidelines.

Minnesota
Conciliation Conference[5]

Why a Conciliation Conference?

. . . The conciliation conference is intended to encourage parents and district officials to attempt to resolve their differences without going to a hearing. A conciliation conference is not held if the parents just want more information or an explanation of why the district officials are proposing an action.

What Is the Purpose of and Factors To Be Considered in a Conciliation Conference?

The purpose of the conciliation conference is to attempt to get both the parents and district officials to work towards developing agreement on issues where there is disagreement. A natural reaction can be that district officials will be defensive about a parent questioning what they are proposing. Other natural reactions are that the parents may feel intimidated or that they should not question district officials. District officials need to recognize that these feelings, or others, may be involved when a conciliation conference is requested by the parents.

A conciliation conference may need to provide an opportunity for dealing with feelings. There are techniques that can be used to maximize the conferences as a vehicle for resolving differences. Examples of what can be done are to have the conference in as pleasant an atmosphere as possible; for example, coffee can be

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[5]Special Education Administrative Handbook on State Special Education Laws and Regulations. Minnesota Department of Education, Special Education Section. No date. [Rules and regulations promulgated to meet Minnesota's 1976 mandatory special education law.] pp. 29-32.

served, ashtrays provided, etc. Parents should not be isolated from the rest of the school staff involved in the conference. District officials can reassure the parents that all are there to work together to arrive at a mutual solution. Parents should be encouraged to participate meaningfully in the discussions rather than district personnel dominating the conference. District officials can talk to the parents prior to the conference in order to explain the process that will be followed in hopes that it will make the parents more comfortable. Throughout the entire process, it has to be remembered that the child belongs to the parent. . .

When ~~Must~~ Should a Conciliation Conference Be Held?

. . . The conciliation conference is to be held at a time and place mutually agreeable to the parent and the district officials. More than one conciliation conference may be held by mutual agreement.

It is recommended that conferences be held during the school day unless it poses a hardship on the parents. The concept of reasonableness should apply to both the parents and school staff when scheduling conferences.

What Happens At a Conciliation Conference?

All data gathered on the student regarding identification, assessment and program planning should be made available to all parties involved in the conciliation conference. [Take care that confidentiality requirements of the Family Education Rights and Privacy Act (FERPA, or the Buckley Amendment) are not violated.]

At the conciliation conference, the parent and district officials should review the proposed action, the school officials' reasons for the action, and the reasons for the parent's objection. It is important for district personnel to delineate the proposed action in very specific terms, so that areas both of agreement and disagreement become apparent. In many cases, there may be many more areas of agreement than disagreement, and these can be implemented while the parent and district officials attempt to resolve the reamining issues.

Who Should Attend a Conciliation Conference?

District officials, parents, and other persons involved in the team planning conference should attend the conciliation conference. In addition, it may be useful to have in attendance a knowledgeable person who has not previously been involved in planning for the student. . . Any . . . child advocate could be an appropriate resource for this purpose. [FERPA considerations.]

Parents may, at their expense, be represented by legal counsel or another person of their choosing. This applies to all conciliation conferences.

What Happens After the Conciliation Conference?

. . . A summary of the results of the final conciliation conference must be written by the district officials and sent to the parents in the form of a memorandum.

The district officials must proceed with the proposed action if the parents agree . . .

If the parents . . . do not agree to the proposed action outlined in the memorandum, they may request a hearing . . .

What Is a Memorandum?

Within seven school days of the final conciliation conference, district officials shall send the parents a written memorandum which includes the following information:

1. The district official's proposed action after the conciliation conference. This may be a modification of the original proposal and may include that the district agrees with the parent.

2. The parent's right to an ~~informal~~ formal due process hearing, if they continue to object to the proposed action. The statement of rights shall include the procedures and timeline for requesting a hearing.

3. A "request form" on which the parent may request a hearing. The parent need not use the form, but may choose to make a hearing request by other written means.

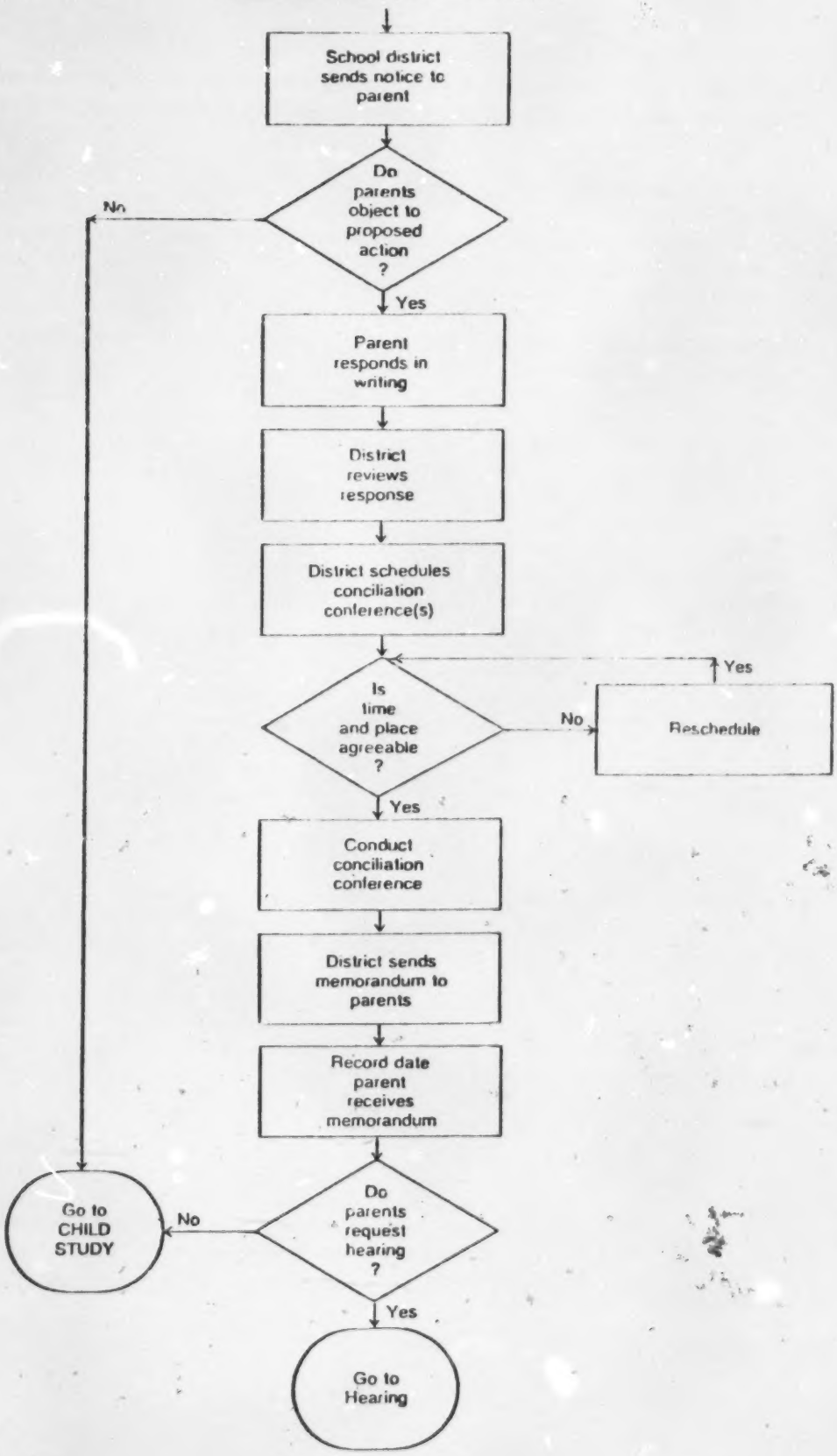
4. Identification of the district employee to whom the written request for a hearing should be mailed, and to whom legal documents or other requests related to the hearing may be directed.

5. . . .

6. A statement that, if the parents request a hearing, they will receive a notice describing their rights relative to the hearing and the procedures that will be followed including their right to be represented by legal counsel at their expense.

[The following flow chart details the steps of the conciliation conference.]

CONCILIATION CONFERENCE: OVERVIEW



If the parents send back a written request for a hearing . . . , the district officials must immediately begin to prepare for the hearing . . .

Connecticut
Mediation Procedures Under (Section 10-76h) of the Connecticut General Statutes[6]

Introduction

Mediation is an optional process offered to two parties with differing viewpoints. The process is usually offered to the parties as a flexible and informal way of resolving differences through understanding and/or compromise of the differing viewpoints.

A mediator enables the parties to present their respective positions with the idea that mutual understanding and a solution may be reached to the differing viewpoints.

Mediation - An Optional Process Under Section 10-76h of the Connecticut General Statutes

Hopefully, to eliminate the need for large numbers of local hearings and reduce the number of state hearings, Section 10-76h(b)(1) allows mediation to take the place of a local hearing. If differing viewpoints exist relative to a handicapped child between the parent(s) or guardian(s) and a local school district, both parties may request mediation between themselves and a mediator assigned by the State Department of Education.

Section 10-76h(b)(1)(2) of the Connecticut General Statutes states:

> (b) (1) A parent or guardian of a child requiring special education under sections 10-76a to 10-76g, inclusive, and section 10-94a and the board of education of the school district responsible for providing such special education may, in lieu of the hearing provided in subdivision (1) of subsection (a) of this section, agree in writing to submit such matters to be reviewed to the secretary of the state board of education for mediation. Within fifteen days of the

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[6] Memorandum to School Personnel, Parents and Interested Citizens from Claire B. Gallant, Mediator, Bureau of Pupil Personnel and Special Education Services, Connecticut State Department of Education, May 20, 1977.

receipt of a request for mediation, signed by both parties, said secretary shall appoint a mediator, knowledgeable in the fields and areas significant to such educational review of such child, who shall attempt to work out a solution which is acceptable to both the local board and the parent or guardian of such child.

(2) If no agreement can be reached within fifteen days after the mediator first meets with the parties, such mediator shall certify in writing to the parties that mediation has not been successful and within fifteen days of such certification, either party may proceed in accordance with the provisions of subdivision (2) of subsection (a) of this section.

Procedures for Mediation

A. Parents and School Districts Agree to Seek Mediation

1. Parties submit, in writing, to the State Department of Education a request for mediation. The request should be signed by both parties. The services of a state mediator may be obtained by writing to:

Robert I. Margolin, Chief
Bureau of Pupil Personnel and
Special Educational Services
P.O. Box 2219
Hartford, Connecticut 06115

2. The State Department assigns a mediator and must schedule a mediation session within 15 days of receipt of the written request.

B. Mediation Session

1. Mediation must be scheduled within 15 days of receipt of the request.

2. No material need be sent to the mediator. All pertinent documents and records are shared at the mediation session.

3. The parent(s)/guardian and/or the school system may bring an attorney or an advisor in addition to as many other people as are deemed necessary. However, it is advisable that participants be kept to a minimum.

4. All participants should be prepared to set aside the entire day even though most mediation sessions last between 2½ and 3 hours.

5. The mediator tries to clarify issues, seek omissions of fact and discourages overemphasis on irrelevant background, philosophical biases and preconceived conclusions.

6. The mediator may discuss privately with either party any information that is so sensitive that it should not be shared.

C. Other Significant Factors in Mediation Process

1. Participants

a. The parent(s)
b. The child when appropriate or 18 years of age
c. LEA representatives:
-a PPT representative empowered to make decisions
-the child's teacher
-a staff member in pupil personnel or special education who has a good working relationship with the parent
-a parent advisor or attorney at the parent's discretion

2. Communication

a. There must be a readiness for communication.
b. All records should be available at the mediation session.
c. Open communication is the goal of mediation.

3. Information

It is essential that all parties to the mediation know the limitations as well as the full intent of Section 10-76a-j.

All aspects of the LEA program should be studied by parents and parent consultants.

4. School Records and Procedures

Observable facts, not impressions or opinions, must be evident in the student's record. The Connecticut State Department of Education has outlined procedures in Confidentiality of Records and Protection of Children's Rights. The Council for Exceptional Children's publication, A Primer on Due Process, provides excellent examples of usable forms (see particularly, Forms 7, 8 and 9 in the Appendix of their monograph).

All school records as well as outside records that are used in diagnosis or decision making should be included.

Outlines of Mediation Sessions

A. Agreement

The parties will reach agreement and sign a mediated contract which obligates all parties to the terms of the contract. The contract is written in explicit terms.

B. Non-Agreement

If the parties fail to reach an agreement within fifteen (15) days, the mediator endorses that mediation has been terminated and either party may request a state hearing.

Values of Mediation

Mediation can be a workable mechanism for objectivity and fruitful negotiation.

Mediation can be less difficult and less time consuming, as well as less costly, for both parties than local or state level hearings.

When communication becomes tenuous due to various factors, mediation can be a solution as objectivity is ensured by the state mediator.

Questions regarding mediation procedures can be directed to:

Claire B. Gallant, Consultant
Bureau of Pupil Personnel and
Special Education Services
P.O. Box 2219
Hartford, Connecticut 06115
Telephone: 566-5635

F. P. GROSS RESPONDS TO QUESTIONS ABOUT IMPARTIAL HEARINGS[1]

At an orientation meeting, held on January 17, 1978 for candidates for serving as IHO's in Cuyahoga County and a number of school district representatives and parents, Mr. F. P. Gross of the Ohio Division of Special Education responded to a list of questions that had been generated for the meeting from school personnel who have had or anticipate having a hearing. He indicated that for a number of questions there may be no answers until we have had more experience than the six hearings held in Ohio as of December 1, 1977. He pointed to the basic philosophy behind due process in the Federal Regulations and in Ohio Special Education Program Standards; namely, that through effective and open communication with parents, including agreements about what is happening to a child, the parents and the schools may come to some basic understandings of what is really in the best interest of the child. In addition, it is expected that differences of opinion should be resolved by responsible people at the lowest level possible. Thus, a series of communication formats in escalating formality have been established including: Case Conference, Placement Team Conference, Administrative Review, Impartial Hearing, State Level Review, and Appeal to Courts. Reasonable differences of opinion should be worked out early in the series. It is also expected that if either the school system or the parents are way out-of-line, then as the sequence is followed, eventually the party out-of-line should recognize this and adjust. Thus, it is assumed that there would be relatively few cases that should require a formal impartial hearing.

Gross listed some basic problems and unanswered questions that are associated with hearings:

1. The impartial hearing is a new procedure for most schools throughout the country and there are yet not enough cases to base interpretations of standards or rules and regulations on precedent as is done in case law.

2. There are yet not enough cases that have been appealed to the court system to know how courts will interpret the law and regulations.

3. What type of individual makes the best hearing officer? (Is a lawyer with some training in special education better than someone trained in special education who has some training in legal procedures?)

4. The cost of some hearings may exceed the cost of either going directly to court, or of providing the child everything that the plaintiffs wish. (Costs range so far between $4,000 and $15,000 for direct and indirect costs)

5. What are the best ways of training hearing officers?

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[1] F.P. Gross is Assistant Director for Procedural Safeguards and Due Process for Ohio. This paper, prepared for dissemination in Ohio's training program for impartial due process procedures, is reprinted here with permission.

6. What are the best ways of training school personnel so as to avoid the types of errors which are violations of due process?

7. Can there be developed from hearing officer decisions some general principles which are helpful for determining more precisely what is an appropriate education for each handicapped child?

Gross then responded to the following specific questions regarding Impartial Hearings. His responses have since been amplified in some cases by him as a result of additional information obtained since the meeting. In the responses that follow, references to Standards for Special Education adopted by the State Board of Education are followed by a page number in parantheses. The number refers to the page in STANDARDS FOR SPECIAL EDUCATION, published by the Ohio Department of Education in 1977. When a section is indicated, the reference is to RULES AND REGULATIONS for the IMPLEMENTATION of PART B of the EDUCATION of the HANDICAPPED ACT, Public Law 94-142:

1. Is there a limit to the number of due process hearings a parent may initiate?

   a. "An impartial due process hearing may be requested when there are differences on any matter relating to the evaluation or educational placement of the child..." Standard 3301-51-16 (Page 78)

   b. The hearing may be initiated whenever the agency proposes to initiate or change the identification, evaluation, or the educational placement of the child or the provision of a free appropriate public education to the child, or if the agency refuses to initiate the same. Sections 121a.504 and 121a.506

   c. It would appear that a parent could request a hearing at any time that the agency proposes to make a basic change from the hearing officer's decision, or otherwise modifies the child's placement or services.

   d. If there are no changes, then it would appear that a parent could request another hearing at the time of the annual review or the development of the IEP.

2. If the information about a child is given out during an open due process hearing, do the privacy statutes still apply?

   a. Section 3319.321, Ohio Revised Code, and 20 U.S.C. §1232 (g) prohibit the release of personally identifiable information concerning any pupil without the written consent of the parent (with certain exceptions).

b. The statutes and regulations dealing with the education of handicapped children do not alter these confidentiality requirements.

c. Therefore, unless the parents have given their express, written consent or have otherwise waived the confidentiality of personally identifiable information presented at the hearing, the confidentiality of that information must be preserved.

d. If the parents desire to have an "open" due process hearing (i.e., open to attendance by the press or other members of the general public), they should be requested to consent thereto in writing in advance of the hearing after being informed that such consent will constitute a waiver of their right of privacy with respect to the personally identifiable information to be presented at the hearing. In the absence of such consent, the hearing should be conducted in private, and the confidentiality of the proceedings should be maintained in accordance with Standard 3301-51-16, (Page 82).

e. Although the due process hearing is "quasi-judicial" in nature, there is no present statutory authority giving the hearing officer the power to issue subpoenas.

f. In the absence of such authority, the exception of 20 U.S.C. 1232 (g) (b) (2) (B), permitting the furnishing of subpoenaed information without written parental consent, cannot be utilized.

g. If the records to be introduced at the hearing contain personally identifiable information about children other than the child who is the subject of the hearing, the right of privacy of the other children must be preserved. (20 U.S.C. 1232g (a) (1) (A)).

h. The information concerning the other students should be removed from such records before they are inspected by the parents of the child in question or introduced in evidence at the hearing.

i. Calling the parents of the other children as witnesses would not be an effective means of altering this requirement. Written consents from the other parents, if obtainable, would be.

3. With respect to time limits, mandated in the law, what happens if the hearings are to take place when witnesses are on vacation or otherwise unavailable.

a. Section 121a.512 states that the public agency shall insure that no later than 45 days after the request for hearing the final decision is reached in a hearing and that a copy is mailed to each of the parties. A hearing officer may grant specific extensions of this at the request of either party.

b. It would, therefore, appear that the parties either agree to proceed without the witness, take a deposition or delay until the witness can participate. If only one party wishes the delay, the hearing officer may exercise reasonable discretion.

4. Is there any limit to the number of attorneys or number of advisors or knowledgeable others that a parent may bring in to give advice?

a. Section 121a.508 states that any party to the hearing has the right to "be accompanied and advised by counsel and by individuals with special knowledge or training with respect to problems of the handicapped." Ohio Special Education Program Standard 3301-51-16 (Page 80), also uses the plural and does not limit the total number.

b. Standard 3301-51-16 (Page 80), also states that "these persons shall be given an opportunity to participate in the hearing process according to procedures established by the hearing officer."

c. There is no specific limit as to the number of attorneys or other representatives who may be brought by a party to the proceedings.

d. The participation of those persons in the hearing is subject to the reasonable control of the hearing officer, Standard 3301-51-16 (Page 80).

e. Questions relating to the role played by each should be discussed at the pre-hearing conference.

5. Do witnesses need to meet any test of competency or expertise?

a. Section 121a.508 provides that any party can prohibit the introduction of any evidence that has not been disclosed to that party at least five days before the hearing.

b. Any evidence offered by either party which is pertinent to the issues, is otherwise competent and has been disclosed to the other party at least five days before the hearing should be admitted.

c. The hearing officer must make the determination as to competency and relevancy.

d. The hearing officer should advise the parties well in advance of the hearing of the "five-day requirement" (Section 121a.508) and require a full disclosure at the pre-hearing conference of the substance of the evidence to be presented by both parties.

e. This would include an identification of all the exhibits to be offered and a summary of the testimony of all witnesses.

f. Any questions as to competency or relevancy should be resolved at that time.

6. Can either party prevent a witness from testifying on grounds of relevancy or lack of it?

a. Section 121a.508 states that any party has the right to confront and cross-examine a witness; so does Standard 3301-51-16 (Page 81).

b. It would be appropriate for the party to make known any objections both at the pre-hearing conference and at the hearing.

c. If the hearing officer determines that a certain item of evidence offered by either party is totally irrelevant to the issues before him, he may exclude it from the record.

d. However, since the regulations and standards do not require the hearing to be conducted under the strict rules of evidence which apply in a court of law, the hearing officer should exercise his discretion liberally in favor of admitting evidence, rather than excluding it, and depend upon cross-examination of the witnesses to disclose any weaknesses or irrelevancies in their testimony.

7. What if a witness lies? Are there any penalities? What should be done?

a. There is no provision in the regulations or standards requiring the testimony at the hearing to be given under oath.

b. Nevertheless, some hearing officers follow the practice of requiring the witnesses to take oath before giving their testimony.

c. Falsification of testimony under these circumstances may constitute the crime of perjury (a third degree felony) under Section 2921.11, Ohio Revised Code, which provides in pertinent part as follows:

> "No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material."

d. If the witness is not under oath, falsification of his testimony at the hearing is a misdemeanor of the first degree under Section 2921.13, Ohio Revised Code, which provides:

> "No person shall knowingly make a false statement or knowingly swear or affirm the truth of a false statement previously made, when any of the following apply:
>
> (1) the statement is made in any official proceeding.***"

e. The penalty for committing a third degree felony is imprisonment for one to ten years and a fine of not more than $5,000. (Section 2929.11, Ohio Revised Code) The penalty for committing a first degree misdemeanor is imprisonment of not more than six months and a fine of not more than $1,000. (Section 2929.21, Ohio Revised Code)

f. It would be appropriate at the outset of the hearing for the hearing officer to inform all prospective witnesses of their obligation to tell the truth and of the possible criminal penalties for not doing so.

g. If a hearing officer is convinced that a witness has lied with respect to a material matter, he should bring the fact to the attention of the appropriate law enforcement official.

8. How are potential witnesses to be notified? Who is responsible for insuring the attendance of a witness the parent might want outside the local school personnel, such as a school board member?

a. The regulations and standards do not expressly require the hearing officer to notify potential witnesses of the hearing. Although both the federal and state statutes give either party the right to compel the attendance of witnesses, the hearing officer does not have authority to issue subpoenas.

b. Therefore, the power of the hearing officer to enforce the right of a party to compel the attendance of a witness who refuses to appear voluntarily is highly questionable.

c. In light of the above, it would seem desirable for the hearing officer to write letters to all prospective witnesses, making it clear that their attendance is expected by him and required by law.

d. If, notwithstanding such a letter, the witness refuses to attend and testify, there may be no effective remedy under existing law to compel him to do so.

9. What should happen if mandated time limits are exceeded?

a. The burden, unless the parties agree that the time limit may be exceeded, rests upon the IHO and the schools, and not the parents.

b. Willful negligence could be construed as a violation of the child's civil rights under the Regulations which prohibit discrimination on the basis of handicap (Section 84.36 of P.L. 93-112, Section 504 Rules).

c. The regulations and standards do not provide an answer to this question. It is arguable that a substantial deviation from the specified time requirements would constitute a denial of due process to the party or parties aggrieved by the delay. On the other hand, a slight deviation from the prescribed time limits would probably not constitute a denial of due process.

d. As mentioned above, it is within the discretion of the hearing officer to grant reasonable extensions of time at the request of either party. It is not necessary for both parties to agree to the extension in order for it to be valid and effective.

e. The hearing officers should be instructed to adhere to the federal time limits unless either party requests an extension of time for good and sufficient reason. The parties should be informed of the time limitations and of their right to request an extension.

f. If time limits are inadvertently missed, the parties should be requested to agree in writing to an appropriate extension of time and to waive any right either of them may have to complain about the delay.

g. In the absence of such agreement, the only alternative may be to go back and start the process all over again.

h. It would seem, however, that such a procedure would rarely be in the best interests of the child, whose educational status will not be changed until all of the proceedings have been completed (Standard 3301-51-16, Page 80).

10. How many copies of records does a school district have to provide the parents, one or more than one?

a. Ohio Special Education Program Standard 3301-51-16 (Page 80), states that the parents "may have access to all school records regarding the child, and, if they wish, they may obtain copies of these records at the actual cost of copying. They may designate in writing, persons who would have similar access to the child's records and an opportunity to obtain copies of these records."

b. The Regulations for the Family Rights and Privacy Act (Section 99.8) and Part B, EHA, Section 121a.566 under the confidentiality section both state that the school "may charge a fee for copies of records which are made for parents...if the fee does not effectively prevent the parents from exercising their right to review and inspect these records." No charge can be made for search and retrieval.

11. How can the hearing officer insure that the proceedings are handled with dispatch?

a. At the pre-hearing conference the IHO can review with both parties each individual's role and function and establish an expected schedule of testimony.

b. At the start of the hearing, the IHO should review again each party's role, the procedures, and time schedule that will be followed.

c. During the hearing he should insist that these procedures be followed and resist any attempt by a party or his representative to expand the hearing beyond the issues properly before it.

12. Are the tapes of transcriptions public records? To whom may they be released?

a. As discussed above, the personally identifiable information about the child is confidential and may not be released by the school officials unless the right of privacy is waived by the parents. It would seem that by exercising their right to open the hearing to the public (Section 121a.508) the parents would be waiving their right of privacy with respect to the evidence presented at the hearing.

b. In the absence of such a waiver, all of the evidence presented at the hearing should be considered confidential, and all necessary procedures to protect confidentiality should be followed, as provided in Standard 3301-51-16 (Page 82).

c. The obligation to maintain confidentiality of the records extends not only to the school district but also to the hearing officer and the State Board of Education upon any appeal.

d. Under normal circumstances, the hearing officer should not retain a copy of the transcript but should return it to the school district for retention in its files or forwarding to the State Board of Education.

e. If the parents have not waived their right of privacy as to such information, it can be presumed that they will protect the confidentiality of their copy of the transcript. Should they fail to do so, they would waive their right of privacy at the time of the disclosure.

13. Is the IHO's summary of facts and findings in a hearing confidential?

a. Standard 3301-51-16 (Page 82) states that the summary will be sent by certified mail to the parents, superintendent, and to any other agency involved in the hearing not more than 20 days following the hearing. The State Department of Education must, by regulations, receive a copy and must present the case to the State Superintendent's Advisory Council for Special Education after removing personally identifiable information.

b. The State Department of Education has instituted measures to protect confidentiality. The written summary is to be treated by the agency as confidential information.

c. If the parents' right of privacy has not been waived, any person or institution who receives a copy of the hearing officer's decision is obliged to protect the confidentiality of the personally identifiable information contained in that document.

14. Does the hearing have to be open to the public?

a. According to Part B, EHA, Regulations, Section 121a.508, the parents involved in hearings have the right to open the hearing to the public and to have the child who is subject to the hearing present.

b. Note that Standard 3301-51-16 (Page 80) allows the hearing officer to have discretion over whether a child under 18 attends all or parts of the hearing.

c. Note that in such cases the federal rules and regulations control.

15. What if one side simply fails to appear? Does the hearing go on or is it postponed? Can it be protested later?

a. It is recommended that school districts use the same procedures as if the parents were to fail to show up for an IEP conference, which is that:

(1) Each school district shall take steps to assure that the parents of the handicapped child are present at the conference.

(2) The conference may be conducted without the parent provided that the parent furnishes a written waiver of his right to participate in accordance with due process procedures, or there is sufficient documentation of attempts to arrange a mutually agreeable time and place.

b. It would appear that if a party has received adequate and proper notice of the hearing and fails to appear, the hearing may proceed in his absence without violation of his rights of due process. The party who does appear should not be permitted to prevail by default, but rather should be required to present evidence in support of his position with respect to the issues involved. The record so made would provide an evidentiary basis for the decision of the hearing officer and would leave the defaulting party only with his right of appeal.

c. Before proceeding as above suggested, every effort should be made to contact the defaulting party to determine whether there is any reasonable justification for his absence. If that question is answered in the affirmative, the hearing should be re-scheduled at a time when both parties could be present.

16. Does the district have the right to request an advance review of the IHO's findings?

a. No, and neither do the parents.

b. The parties must await receipt of the decision of the hearing officer in accordance with the provisions of Standard 3301-51-16 (Page 82).

17. Once parents have requested that a hearing officer be selected, how many days do they have?

a. Section 121a.512 says the public agency shall insure that not later than 45 days after the receipt of a request for a hearing, a final decision is reached and a copy of the decision is mailed to each of the parties. A hearing officer may grant specific extensions of time beyond the periods set out at the request of either party.

b. Standard 3301-51-16 (Page 79) states that "the impartial hearing shall be conducted within 40 days unless otherwise agreed." Standard 3301-51-16 (Page 82) states that "a written summary of the facts and findings will be sent by certified mail...not more than 20 days following the hearing."

c. The federal timelines should be observed, subject to the right of the IHO to grant reasonable extension of time.

18. How is the phrase "least restrictive environment" being interpreted?

a. The phrase "least restrictive environment" is defined in the federal regulations (Section 121a.550) as follows:

> "Each public agency shall insure:
>
> (1) that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
>
> (2) that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

b. The definition of "least restrictive alternative" contained in Standard 3301-51-18 (Page 93) is as follows:

> "'Least restrictive alternative' is an appropriate public education designed to meet the unique needs of each handicapped child in such a way as to assure that the child's removal from the regular education environment is no more restrictive than necessary to insure a maximum educational experience. That is, to the maximum extent

appropriate, the handicapped child is educated with children who are not handicapped, and that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily."

c. There is no difference in substance between the two definitions.

d. The application of the "least restrictive environment" consent in determining the appropriate placement for any particular child will depend upon a careful consideration of all pertinent facts relating to that child.

e. This is determined on an individual basis as a result of the multi-factored assessment and the IEP.

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STATE / QUESTION	ILLINOIS	MASSACHUSETTS	MICHIGAN	MINNESOTA
	John Straus, Spec. Ed. Specialist, IDSE	Carol Kervick, Dir., Bureau of Spec.Ed. Appeals	John Braccio, Super., Compliance & Approval/Spec. Ed. Services, MDE	Bob Wedl, Asst. Dir. of Spec. Ed., MSDE
1. How many impartial due process hearings are being held in your state per year?	8-76 to 4-78: 233 (111 local, 122 state level).	9-74 to 5-77: 1200 requests: Hearings 361 Mediated Agreements 560 Withdrawn 73 Pending 206	Estimate 125/year at local level; 40 at state level since October, 1973.	6 hearings during the current school year (2 also resolved prior to hearing).
2. How many impartial hearing officers (IHOs) have you appointed? Trained?	Between 60 and 70 IHOs have been trained.	4 full-time IHO (SEA level); 9 mediators (regional level); 30-40 consultants for appeals & mediation.	LEAs appoint; 27 trained recently.	None officially trained.
3. How many cases is each IHO expected to hear in a year?	The projected number is 3 per year.	5-6 per month.	One staff person conducted most of state-level hearings.	Thus far, no IHO has heard more than one case.
4. Who are you using for IHOs?	Requirements: bachelor's, major or minor in Ed. or related human services; 3 yrs. prof. service; special ed. certification.	Attorneys with special education backgrounds.	School and university personnel primarily.	Educators, attorneys, a judge, etc; selected from Office of Hearing Examiners or school boards appoint.
5. How are you recruiting IHOs?	LEA directors of special ed., state advisory council make recommendations.	Initial recruitment was in graduate schools of education and law schools No longer recruiting	LEA option; must be a resident of an LEA other than the one involved in the hearing.	Not currently recruiting; come from Office of Hearing Examiners, or appointed by Comm. of Education.
6. Is the IHO paid? If so, how?	$75/day plus expenses.	IHO-$14,000-$18,300 per year; Mediators-$13,200-$16,400; Consultants-$66 per day.	Negotiated at LEA level; general fee is $100 per day.	Depending on source paid by agreed contract; or varies but is approximately $150/day plus expenses.
7. How are you training IHOs? Have you developed materials? Who is responsible for training?	Self-guided training session by Special Ed. Specialist and staff using handbook.	Four-day workshop with state-developed manual, video tapes and exercises. Bureau of Special Ed. Appeals is responsible; bring in consultants, e.g., attorney general.	MDE manual [included]. 3-day session under SEA Compliance and Approval program.	Training will be done by the state using an administrators handbook.

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CESS HEARINGS

NEW JERSEY	OHIO	PENNSYLVANIA	TENNESSEE	UTAH
Kenneth Koehli, Chief Classification Officer, Bur. of Spec. Ed. & Pupil Personnel	S.J. Bonham, Jr. Dir. of Spec. Ed., OSDE	Linda O'Connor, Assistant for Right to Education, Bureau of Special Education	Marion Parr, Director of Federal Programs, TSDE	Benjamin Bruse, Specialist, Programs for the Handicapped, USBE
41 last year (requests for 150 but only 41 ended in hearings).	6 last year; 0 this year (2 pending).	89 in the last calendar year.	25-30 hearings during school year.	3 during current school year.
5 trained.	LEAs maintain the lists; regional centers have trained 8 IHOs.	70 appointed and trained.	Currently have 9.	8 trained and qualified.
One full-time IHO hears most of the cases.	Not applicable.	No more than 5 cases per year.	No restrictions; depends on who is available and hearing location.	Not applicable.
Special educators; master's degree in special education is required.	Volunteers: ministers, social workers, educators, professors, lawyers, etc.	Special educators with a few regular educators.	Most often educators, have used a retired juvenile judge, etc. Must have bachelor's degree.	No special group.
Recruited by the state employment process.	Regions recruit by newsletter to parents and advocate groups, etc.; orientation prior to selection.	Selected from personal recommendations; not currently recruiting.	Individuals must be approved by the Commissioner of Education.	SEA recruits; ultimate goal is 40 trained hearing officers for the state.
An annual salary is paid to main IHO, others by the day.	IHOs indicate fee on application; ranges from no fee to $35/hour.	$100/hearing plus $7.50/hour for writing the decision.	$75/day for two days (hearing and writing decision), plus expenses.	Varies - individual agreements between IHO and LEA. No state specifications.
Inservice workshops; legal writing seminar; ongoing inservice; all under direction of Chief Classification officer. Manual under revision.	SEA asst. director trains IHOs using the Impartial Hearing Officer Manual [included].	Two meetings per year under direction of Asst. for Right to Education, with additional mailings; manual used for initial training.	SEA provides inservice workshops and a manual.	SEA will train. Materials developed, including training film.

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STATE / QUESTION	ILLINOIS	MASSACHUSETTS	MICHIGAN	MINNESOTA
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8. Does the SEA allow the parent to participate in the selection of the IHO or to challenge the selection made by the SEA? or the LEA?	No. The state will review a challenge.	No. Parents may challenge choice if they can demonstrate good cause.	No, but can appeal. (Have had very few problems, which is attributed to residence requirement.)	Parents and school district must agree. Parents generally participate.
9. Do you have a procedure for mediation?	No formal procedure; LEAs are encouraged to mediate informally.	Yes. Regional mediator arranges prehearing conferences. If parent rejects offer or if solution not reached, mediator informs parents of rights, etc. [inc.]	Not currently. Proposed rules under consideration.	Yes, a conciliation conference prior to the hearing, with specific format. [included]
10. Is there a state or district mediation officer or is someone different appointed for each case?	No.	9 mediators (in 6 regions) have designated areas.	Not applicable.	No.
11. What happens to the records of the hearings?	Become part of the student's temporary file; kept 5 years.	SEA keeps 5 years.	Become part of school records.	The parent and the local school district each get a copy; Comm. of Ed. in case of appeal.
12. Is there any provision for making a summary of decisions public?	The state is currently compiling a digest of decisions.	Decision is published; school system is idenified but not the parents or child. Parent can release to the public.	In preparation. Results are individualistic, and breakdown difficult.	The decision is filed with the state and is made public.

CESS HEARINGS (continued)

NEW JERSEY	OHIO	PENNSYLVANIA	TENNESSEE	UTAH
Kenneth Koehli, Chief Classification Officer, Bur. of Spec. Ed. & Pupil Personnel	S.J. Bonham, Jr. Dir. of Spec. Ed., OSDE	Linda O'Conner, Assistant for Right to Education, Bureau of Special Education	Marion Parr, Director of Federal programs, TSDE	Benjamin Bruse, Specialist, Programs for the Handicapped, USBE
No, but a challenge would be considered.	School and parent must agree; if parent disagrees, SEA appoints lawyer.	No, but a challenge is investigated.	No, but honors requests if possible. (IHOs selected by chance.)	Handled at LEA level; parents not involved, but may appeal selection with justification.
Yes	A prehearing conference can be held to try to mediate the difficulty; ombudsman also handles complaints.	Prehearing conference recommended at the district level.	The Right to Education Officer holds mediation conferences throughout the state.	Not formalized; recommend mediation begin at level of parents and teacher, then parent, principal, etc.
Child Study Team, with SEA and LEA representatives, work with the parent; LEA can also appoint mediator.	SEA Assistant Director for Procedural Safeguards and Due Process.	District special education director would probably mediate.	The Right to an Education Officer.	No.
Evidence and decision are maintained in perpetuity.	Permanent file kept at Office of SD of Spec. Ed.; findings and conclusions sent to State Advisory Council (less identifiers).	School districts and the Assistant for Right to Education have copies.	Records kept indefinitely.	No regulation currently, but will be maintained in confidentiality.
The hearings proceedings with all identifiable material removed are made available to the public.	The state has prepared a summary of decisions which is available on request.	Summary of decisions is available but individual decisions are not.	No, but discussing future possibilities.	State Advisory Committe responsible to receive decision, comment to public on rules, policies, programs.

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